

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel
625 Broadway, 14th Floor, Albany, New York 12233-1010
P: (518) 402-8543 | F: (518) 402-9018
www.dec.ny.gov

JAN 25 2019

To Whom It May Concern:

This is to advise you, that subject to the terms set forth in this letter, the New York State Department of Environmental Conservation ("DEC" or "Department") will exercise its authority to utilize enforcement discretion with respect to certain provisions of 6 NYCRR Part 360, Part 361, Part 364 and Part 365 of the new Part 360 Series regulations that became effective on November 4, 2017. The DEC will exercise this authority regarding the above provisions until either May 3, 2020, or an amendment to the present rule is promulgated, whichever is earlier. All other provisions of the Part 360 Series remain in effect and will be enforced. This letter replaces a prior exercise of enforcement discretion that would have ended May 3, 2019, and contains new language intended to help clarify what is covered.

I. Materials used in cement, concrete and asphalt pavement

On September 5, 2017, the 6 NYCRR Part 360 Solid Waste Management Facilities regulations were revised, replaced and enhanced, creating a new Part 360 Series. The revisions modified beneficial use determinations for recognizable, uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock. Under the new Part 360 Series, several pre-determined beneficial uses (BUDs) were created to deal with the reuse of these materials (6 NYCRR § 360.12 (c)(3)(viii), (ix) and (x)). Pursuant to these BUDs, these materials cease to be a solid waste when the material meets the requirements for the intended use.

The Department will utilize its enforcement discretion with respect to facilities subject to the requirements of 6 NYCRR Subpart 361-5 and for materials that are destined for and/or stored and maintained at these facilities under the control of the generator or the person responsible for the generation, prior to processing or reuse, in conformance with 6 NYCRR § 360.12 (c)(3)(viii), (ix) and (x).

In addition, these materials (i.e., materials under the control of the generator or the person responsible for the generation, which are destined for and/or managed prior to reuse under 6 NYCRR § 360.12(c)(3)(viii), (ix) and (x)) destined for and/or managed at facilities subject to the requirements of 6 NYCRR Subpart 361-5 may be managed as a commercial product or raw material and are not subject to Part 360 or Part 361.

The transporters handling these materials (i.e., materials destined for a facility under the control of the generator or the person responsible for the generation that are destined for



Department of
Environmental
Conservation

and/or managed prior to reuse under 6 NYCRR § 360.12(c)(3)(viii), (ix) and (x)) are also not subject to 6 NYCRR § 360.4, 360.15, and Part 364.

EXPLANATION: The above provisions govern the following materials: Asphalt, asphalt millings, concrete, concrete products (including those that have reinforcing embedded), masonry products, brick and rock.

When these materials are under the control of the contractor and destined for a DEC registered Solid Waste Management Facility that allows for the acceptance and processing of these materials, they meet the requirements of the pre-determined BUDs identified above and are no longer considered solid waste.*

Asphalt and/or asphalt millings under the control of the contractor and destined for an asphalt plant also meet the requirements of a BUD and are no longer considered solid waste.*

Asphalt plants may accept asphalt and asphalt millings and do not require a facility authorization under Part 360 or Part 361. Asphalt and asphalt millings received at an asphalt plant meet the requirements of a BUD and are no longer considered solid waste.

Facilities that hold a DEC registration for a Solid Waste Management Facility, issued prior to November 4, 2017, that allow for the acceptance and processing of asphalt, asphalt millings, concrete, concrete products (including those that have reinforcing embedded), masonry products, brick, rock, and soil are subject to the regulations in place prior to November 4, 2017.

The transporters handling these materials are not required to be registered and a manifest for the materials is not required.

Recognizable, uncontaminated concrete, asphalt, rock, brick and soil used for reclamation at a facility permitted pursuant to the Mined Land Reclamation Law, will not be subject to the otherwise applicable provisions of Parts 360, 361 and 364 if the material has been reviewed, approved and incorporated into the mined land reclamation permit issued to the facility. No fee or any form of consideration may be received by the operator for use of this material. Any material transported to a mine site for such reclamation purposes is subject to monitoring and enforcement by the Department to ensure that no unapproved wastes are accepted or disposed of during mining and reclamation activities. The Department reserves the right to disapprove use of such materials if placement of these materials at a mine site may constitute an environmental hazard.

* Small amounts of soil or other solid waste that are present with these materials do not cause the material to be considered unrecognizable or contaminated.

II. Recycled aggregate from bricks, concrete pavement and/or asphalt pavement

The Department will utilize its enforcement discretion with respect to the use of recycled aggregate from bricks, concrete pavement and/or asphalt pavement when used in or under asphalt pavement or other paved surface, if separated from other waste prior to processing and subsequently processed and stored in a separate area as a discrete material stream.

In addition, these materials, when destined for and/or managed prior to reuse at facilities subject to the requirements of 6 NYCRR Subpart 361-5 may be managed as a commercial product or raw material and are not subject to Part 360 or Part 361.

The transportation of these materials is subject to the waste tracking and registration or permit requirements of Part 364.

III. Construction and demolition facility fill material sampling requirements

The transition date set forth in Section 360.4(b)(2) and (f) for facilities subject to Subpart 361-5 is extended until May 3, 2020. As such, a facility required to obtain a Subpart 361-5 registration or permit will continue to operate pursuant to the facility's existing registration or permit and associated regulations until May 3, 2020, or an amendment to the present rule is promulgated, whichever is earlier.

This stay of enforcement also includes the sampling requirement contained in Section 361-5.4(e), which requires that all permitted construction and demolition facilities perform certain sampling on any fill material or residue leaving the facility for reuse. The Department will utilize its enforcement discretion with respect to this provision to delay the enforcement of this sampling requirement regardless of the timing of the registration or permit issuance to the facility.

IV. Fill Material

The definition of Fill Material (Section 360.2(b)(107)) references "similar material," but does not define what constitutes "similar material." This definition should be enforced consistent with the following:

"Similar material" is to be understood to mean any durable, granular material that contributes to the function of a material as fill – meaning that it can be excavated, transported, placed, and compacted for construction purposes and meets an engineering specification for the purpose for which fill is needed (grade adjustment, structural, barrier, berm, etc.). "Similar material" can include particles of slag, ash, glass, or crushed concrete or other durable human-made material that contributes to the function of the material as fill.

“Similar material” does not include larger, recognizable particles of glass, rock, demolition debris or waste, and also does not include plastic, whether recognizable or not.

As such, the “physical criteria” of General Fill found in Table 2 in Section 360.13(f) is to be understood as including only soil, sand, gravel or rock and small amounts of “similar material.”

General Fill consisting of uncontaminated soil, sand, gravel or rock (including small amounts of “similar material” as defined above) may be used in any setting where fill material meets the engineering criteria for use, except on agricultural land used for raising livestock or producing animal products for human consumption.

V. Mixed Loads

Facilities that hold a DEC registration for a Solid Waste Management Facility, issued prior to November 4, 2017, are allowed to accept mixed loads of asphalt, asphalt millings, concrete, concrete products (including those that have embedded reinforcement), masonry products, brick, rock and soil at their facility, provided the facility’s registration allows for the processing of each of the materials in the mixed load.*

Transporters may deliver mixed loads of material specified above to the facilities specified above.*

VI. Grade Adjustment

Except in Nassau or Suffolk Counties or the New York City Watershed, materials consisting only of recognizable, uncontaminated concrete products (including those with embedded reinforcement), asphalt pavement (not including asphalt millings), brick and rock from construction and demolition activities, may be used for grade adjustment when the following conditions are met:

- 1) The material is received at a project in accordance with an approved local building permit or other municipal authorization, if required, that includes the need for grade adjustment fill;
- 2) The material is only accepted during daylight hours between sunrise and sunset;
- 3) The material does not include residues from C&D debris handling and recovery facilities; and
- 4) The material is placed above the seasonal high groundwater table and no material is placed in a surface water body or wetlands.

* Small amounts of other solid waste that are present with these materials do not cause the material to be considered an unauthorized mixed load, or to be unrecognizable or contaminated. Unauthorized waste that is transported and delivered to a registered solid waste management facility must be adequately segregated, secured and contained in order to prevent leakage or contamination of the environment and must be removed within seven (7) days after receipt. Disposition of such waste must be to a facility or location authorized to receive it. (See Section 360.19(c)(4)).

VII. Waste tires used to secure tarpaulins

The new Part 360 Series, which addresses the use of waste tires to secure tarpaulins in common weather protection practices, requires adjustments to better suit the needs of the agricultural community. The Department will utilize its enforcement discretion with respect to the enforcement of 6 NYCRR Subpart 361-6, as long as the use of waste tires to secure tarpaulins is done in accordance with the pre-determined beneficial use found at Section 360.12(c)(2)(iv) or BUD 1137-0-00, dated December 4, 2014, which permits the use of waste tires to anchor plastic film or other cover material for corn silage, haylage or other agricultural feeds if certain conditions are met.

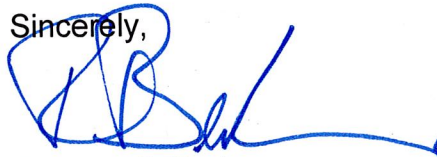
VIII. Storage Requirements for Regulated Medical Waste (RMW)

6 NYCRR § 365-1.2(b)(8) prohibits storage of untreated RMW as follows: "RMW, except sharps, may be held in patient care areas for a period not to exceed 24 hours and at a laboratory or other generation area for a period not to exceed 72 hours, at which time the RMW shall be moved to an RMW storage area. Notwithstanding these time frames, RMW that generates odors or other evidence of putrefaction must be moved to a storage area as soon as practicable." Additionally, 6 NYCRR § 365-1.2(b)(7) states, "sharps containers must be removed from the patient care or use areas to a room or area designated for RMW storage when: the container has reached the fill line indicated on the container; the container generates odors or other evidence of putrefaction; or within 90 days of use, whichever occurs first."

Based on concerns raised by small generators (dental offices, etc.) the Department will exercise its enforcement discretion with respect to these provisions and will require that sharps and RMW containers be removed from patient care or use areas to a room or area designated for RMW storage when the container has reached the fill line indicated on the container, is otherwise filled, or the container generates odors or other evidence of putrefaction, whichever occurs first.

Thank you for your cooperation in this matter. If you have any questions, please call Richard Clarkson of the Division of Materials Management at (518) 402-8678.

Sincerely,



Thomas S. Berkman
Deputy Commissioner
& General Counsel